BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LORRENIA L. JARRELL	)	
Claimant	)	
VS.	)	
	)	Docket No. 175,426
WASTE MANAGEMENT OF WICHITA	)	
Respondent	)	
AND	)	
	)	
CNA INSURANCE COMPANY	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Both claimant and respondent appealed the Award entered by Special Administrative Law Judge William F. Morrissey dated May 26, 1995. The Appeals Board heard oral argument by telephone conference.

APPEARANCES

Claimant appeared by her attorney, Steven L. Foulston of Wichita, Kansas. The respondent and its insurance carrier appeared by their attorney, Eric T. Lanham of Kansas City, Kansas. The Workers Compensation Fund appeared by its attorney, Marvin R. Appling of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant and respondent both appealed the following issue:

(1) Nature and extent of claimant's disability.

Claimant appealed the following additional issues:

(2) Underpayment of temporary total disability benefits.

(3) Payment of medical expenses to Riverside Hospital in the amount of $222.20 as authorized medical expenses.

Respondent appealed the following additional issues:

(4) Whether the preliminary hearing Order of Administrative Law Judge Krysl dated April 7, 1994, ordering the respondent to purchase a personal computer for the claimant for $1,700 was reasonable and necessary.

(5) The liability of the Kansas Workers Compensation Fund (Fund).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing arguments of the parties, the Appeals Board finds as follows:

(1) The parties stipulated that claimant was injured while employed by the respondent on June 1, 1992; September 9, 1992; and December 9, 1992. Claimant injured her right shoulder on June 1, 1992; injured her right shoulder again on September 9, 1992; and her left shoulder on December 9, 1992. Claimant had sustained a previous right shoulder injury while working for another employer on May 11, 1990. The claimant and her previous employer entered into a workers compensation settlement on September 25, 1991. Claimant received permanent partial disability benefits in a lump sum amount of $8,500.

In the instant case, the Special Administrative Law Judge found claimant was entitled to permanent partial general disability benefits based on work disability in the amount of 14 percent. The Special Administrative Law Judge found for computation purposes only one

date of accident, December 9, 1992. The parties did not raise date of accident as an issue before the Appeals Board. Accordingly, the Appeals Board adopts December 9, 1992, as the date of accident for the purpose of computing the award. Claimant has appealed the 14 percent work disability finding, arguing the credible evidence supports a work disability award of 68.5 percent. Respondent counters and argues the claimant has only proven entitlement to an award based on permanent functional impairment in the amount of 4 percent. The 4 percent whole body functional impairment was the result of the December 9, 1992, accident which injured the claimant's left shoulder. Respondent contends claimant's previous right shoulder injury was only temporarily aggravated while employed by the respondent and therefore claimant is not eligible for permanent partial disability benefits for the right shoulder. Furthermore, respondent argues the record supports a K.S.A. 44-510a (Ensley) credit for benefits paid claimant for the May 11, 1990, right shoulder injury.

Claimant was employed by the respondent on May 11, 1992, as a residential route driver. Claimant's job required her to service a residential trash collection route by driving a single axle truck from house to house, dumping the trash carts with a mechanical dumper and loading other boxes or bags of trash by hand. Claimant performed the job of the route driver until June 1, 1992, when she lifted a heavy box of trash and injured her right shoulder. Respondent provided treatment for her injured shoulder through Broadway Occupational Medicine Clinic in Wichita, Kansas. Dr. Louis Royal of the Clinic prescribed physical therapy treatment and returned claimant to light duty on June 19, 1992. Claimant was released by Dr. Royal to full duty without restrictions on August 14, 1992.

Claimant sustained a subsequent injury to her right shoulder at work on September 9, 1992. This injury occurred as claimant was delivering new trash carts and picking up trash carts from canceled customers. Claimant injured her right shoulder when she grabbed a trash cart at a deserted house which she thought was empty but was loaded with trash. At that time, she testified "the whole right shoulder felt like it was torn off." Claimant testified she had never felt such a severe pain before.

Respondent again provided medical treatment through Dr. Royal at the Broadway Occupational Medicine Clinic. This time, Dr. Royal referred claimant for further medical treatment to Harry A. Morris, M.D., an orthopedic surgeon in Wichita, Kansas. Dr. Morris first saw claimant on September 22, 1992, and diagnosed impingement syndrome, tendinitis with possible early adhesive capsulitis. The doctor prescribed physical therapy, pain medication, and he took claimant off work. The claimant was returned to work with restrictions to essentially work with her left hand instead of her dominate right hand on December 8, 1992.

The first day claimant returned to work she drove a truck to Kansas City and back. The next day, December 9, 1992, claimant placed stickers on trash cans and painted with her left hand. Because of the cold weather, claimant was required to take the trash carts

inside. She was required to open and close large garage doors with her left arm numerous times during the work day. After work, she had muscle spasms in her left shoulder which caused her extensive pain. Claimant returned to the Broadway Occupational Medicine Clinic the following day and was again referred for treatment to Dr. Morris.

Dr. Morris saw her on December 16, 1992, and diagnosed overuse syndrome to both shoulders being manifested as impingement syndrome. Claimant was taken off work, continued in physical therapy, and placed in a pain management program. Dr. Morris last saw claimant in July 1994 with continued crepitis and instability in both shoulders. The doctor continued the claimant on pain medication. Dr. Morris had previously indicated that claimant had met maximum medical improvement and rated her shoulder injuries in March 1993. Dr. Morris opined that claimant had suffered a 5 percent permanent functional impairment to the left shoulder or 3 percent of the whole body and a 3 percent permanent functional impairment to the right shoulder or 2 percent of the whole body. Dr. Morris combined those two ratings for a 5 percent whole body permanent functional impairment rating. Claimant was released to return to work with the following permanent restrictions: occasionally lifting of 20 pounds, limited to simple grasping frequently, pushing and pulling occasionally, and overhead work occasionally.

At the request of claimant's attorney, Ernest Schlachter, M.D., examined and evaluated the claimant on April 30, 1993. Dr. Schlachter had previously examined and evaluated the claimant on April 12, 1991, for her right shoulder injury which occurred while employed by another employer on May 11, 1990. For the May 11, 1990 injury, Dr. Schlachter diagnosed impingement syndrome and tendinitis of the right shoulder. The doctor assigned a 10 percent permanent functional whole body impairment as a result of that injury. The doctor permanently restricted claimant's use of her right arm to no working above horizontal, no repetitive lifting over 25 pounds, no single lifting over 40 pounds, no single lifting with both arms over 50 pounds, and to avoid repetitive pushing and pulling.

In regard to claimant's recent shoulder injuries, Dr. Schlachter also diagnosed impingement syndrome and tendinitis of both shoulder girdles. The doctor opined claimant's permanent functional impairment of the right shoulder was 10 percent to the body as a whole and opined the 10 percent rating was all attributable to the previous May 11, 1990, injury. The doctor further opined the injuries claimant received to her right shoulder while working for the respondent were temporary aggravations resulting in no additional permanent impairment. Claimant's left shoulder injury was rated by Dr. Schlachter at 5 percent whole body permanent functional impairment which he causally related to her work activities while employed by the respondent. Dr. Schlachter imposed permanent limitations on claimant's activities with either arm of no repetitive lifting more than 25 pounds, no single lifts of more than 30 pounds, avoid repetitive pushing and pulling, avoid working above horizontal. Dr. Schlachter limited lifting with both arms to a maximum of 45 pounds.

After claimant was released by Dr. Morris with permanent restrictions, respondent was unable to offer claimant a job that would accommodate the restrictions. Claimant established through her testimony the only job she had been able to find was working part-time for Radio Shack averaging approximately 21 hours per week earning minimum wage of $4.25 per hour. Accordingly, since claimant was not earning a wage comparable to her preinjury wage she is eligible for permanent partial disability benefits based on work disability. *See* K.S.A. 1992 Supp. 44-510e. The Special Administrative Law Judge found claimant was entitled to permanent partial disability benefits of 14 percent based on work disability. In arriving at the 14 percent work disability, Special Administrative Law Judge factored in prior permanent restrictions that had been placed on claimant from the May 11, 1990, injury. The Special Administrative Law Judge also found claimant had the ability to earn a comparable wage based on her satisfactory completion of a computer aided drafting program furnished by the respondent through the vocational rehabilitation provisions of the Workers Compensation Act.

Before claimant was employed by the respondent, she was required to undergo a pre-employment physical examination by a physician employed by the respondent. In conjunction with this physical examination, claimant was required to complete an Occupational Medical Questionnaire where she disclosed she had suffered a previous work-related right shoulder injury on May 11, 1990. The respondent's physician examined the claimant and certified her as medically qualified for the residential driver job. Claimant testified her right shoulder had healed by the time she applied for the job with the respondent. Claimant further testified she did not recall that the physician, who had previously treated her for the May 11, 1990, injury, had imposed permanent restrictions on her activities. Claimant testified it was her impression any restrictions resulting from that accident were temporary.

The record clearly shows that claimant's job duties as a residential route driver exceeded the previous permanent restrictions imposed by either Dr. Schlachter or Dr. Pollock. Respondent also had knowledge of claimant's previous right shoulder injury from a routine background check report completed by an outside firm which indicated claimant strained her shoulder while working for a prior employer on May 11, 1990. The Appeals Board, therefore, concludes it is inappropriate to take into consideration claimant's preexisting restrictions in determining her current work disability. Respondent had knowledge of her preexisting shoulder injury but accepted her for regular work that exceeded the preexisting restrictions. In fact, after claimant injured her right shoulder on June 1, 1992, the company physician returned her to regular employment without restrictions.

The Appeals Board also finds a comparable wage should not be imputed to the wage loss component of the work disability test. The Appeals Board recognizes that the claimant successfully completed the vocational rehabilitation training course in computer aided drafting. However, claimant established through her testimony that she had made an

unsuccessful effort to find a job utilizing those skills within the Wichita labor market and also within the Dallas, Texas labor market. Accordingly, the Appeals Board finds that although claimant may have the ability through her vocational rehabilitation training to perform a job that pays a comparable wage, which remains to be seen, the available labor market does not contain such a job opportunity. Consequently, the Appeals Board concludes that before a wage can be imputed to the wage component of the work disability test a job has to also be available in claimant's labor market. *See* Scharfe v. Kansas State Univ., 18 Kan. App. 2d 103, Syl. ¶ 2, 848 P.2d 994, rev. denied 252 Kan. 1093 (1992).

Claimant presented the only vocational expert opinion on the work disability test contained in K.S.A. 1992 Supp. 44-510e. Jerry Hardin testified as to the effect of claimant's injuries on her ability to perform work in the open labor market and to earn a comparable wage. Mr. Hardin personally interviewed the claimant on May 20, 1994. He had available for review medical reports of Drs. Schlachter and Morris which contained permanent work restrictions imposed on the claimant following her December 9, 1992, accident. Mr. Hardin's testimony and report also contained his opinion in regard to work disability taking into consideration claimant's previous restrictions imposed on her after the May 11, 1990, accident. As previously noted, the Appeals Board, taking into consideration the particular circumstances and facts of this case, did not find that it was appropriate to consider claimant's previous restrictions in determining work disability.

Mr. Hardin opined claimant had lost 30 to 35 percent of her ability to perform work in the open labor market when he considered Dr. Schlachter's permanent restrictions. Mr. Hardin further opined based on Dr. Schlachter's restrictions that claimant had lost 29 percent of her ability to earn a comparable wage in the open labor market. Mr. Hardin believed claimant retained the ability with Dr. Schlachter's restrictions to earn $260 per week post injury. Utilizing Dr. Morris' permanent restrictions, Mr. Hardin opined claimant had lost 55 to 60 percent of her ability to perform work in the open labor market and had a 45 percent loss of her ability to earn a comparable wage. Wage loss was based on claimant retaining the ability to earn $200 per week post injury. Claimant argued that the wage loss component of the work disability test should be based on her actual weekly earnings which at the time of her testimony she was making $89.25 per week. The Appeals Board disagrees with the claimant's argument and finds that the best evidence in this case of claimant's ability to earn wages should be based on the opinions of Mr. Hardin taking into consideration claimant's education, training, experience, and capacity for vocational rehabilitation.

The Appeals Board finds that claimant's loss of labor market and wage earning ability should be determined by averaging Mr. Hardin's opinions based on both Dr. Schlachter's and Dr. Morris' permanent work restrictions. Accordingly, the Appeals Board concludes claimant has lost 45 percent of her ability to perform work in the open labor market and 37 percent of her ability to earn a comparable wage. Furthermore, the Appeals Board finds no reason not to weigh the components equally entitling the claimant to a work disability in the

amount of 41 percent. *See* Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990).

The Special Administrative Law Judge found a credit for the May 11, 1990, injury was not appropriate in this case because he took into consideration claimant's preexisting restrictions in determining claimant's entitlement to permanent partial disability benefits. As noted above, the Appeals Board did not consider claimant's prior restrictions in determining claimant's eligibility for work disability. Therefore, the Appeals Board finds a K.S.A. 44-510a (Ensley) credit is appropriate to be applied to the work disability award of 41 percent. The credit does not apply to the temporary total disability weeks of compensation paid and the credit terminates on the date the prior disability terminates. As shown in the calculation of the award below, claimant will receive permanent partial general disability benefits at the reduced rate of $77.25 for the overlapping weeks to which the credit applies and then at the unreduced rate of $99.96 per week.

(2) Claimant questions the Special Administrative Law Judge's temporary total weekly disability award. Claimant argues the Special Administrative Law Judge utilized the incorrect weekly compensation rate for 14.29 weeks of the temporary total disability weeks paid. Claimant argues the compensation rate for all weeks paid should be figured at $243.81 per week instead of $224.88. The Appeals Board finds the Special Administrative Law Judge's Award for temporary total disability weekly benefits is correct. The 14.29 weekly temporary total disability benefits were paid to claimant prior to her accident of December 9, 1992. Those weeks were paid at the compensation rate for the average weekly wage not including fringe benefits because claimant remained employed by the respondent and continued to receive those fringe benefits. After December 9, 1992, claimant no longer was employed by the respondent and her fringe benefits were discontinued. Accordingly, the remaining 76.43 weeks of temporary total disability benefits paid should be paid as awarded at the compensation rate of $243.81.

(3) Claimant also requested a medical bill incurred by the claimant on June 1, 1994, be ordered paid by the respondent as an authorized medical expense. Claimant testified that she went to Riverside Hospital Emergency Room and incurred a bill of $222.20 for treatment for her work-related injuries.

The Special Administrative Law Judge did not address this issue in his Award. The Appeals Board finds the issue was raised by the claimant at the regular hearing and also raised by the claimant in her submission letter. However, the Appeals Board also finds that the evidentiary record does not contain persuasive evidence that the medical expense incurred some 18 months after claimant's accident is causally related to her work-related shoulder injury. The Appeals Board therefore finds that claimant's request should be denied.

(4) In a preliminary hearing Order dated April 7, 1994, respondent was ordered to pay for a personal computer for claimant's use in connection with her computer aided drafting course. Respondent questions the reasonableness and necessity of that Order. The Special Administrative Law Judge ordered claimant to either return the computer to the respondent or reimburse the respondent for the amount the respondent paid for the computer. The Appeals Board finds that this is a reasonable solution to this issue and affirms the Special Administrative Law Judge's Order.

(5) The Special Administrative Law Judge found claimant's preexisting shoulder problems contributed substantially to claimant's present shoulder injuries. The Special Administrative Law Judge ordered the Fund and the respondent to equally share the cost of this claim.

Respondent argues that the Fund is 100 percent responsible for this Award. Respondent contends that the December 9, 1992, accident that caused injury to claimant's left shoulder occurred as a result of her not being able to use her dominate right hand. The Fund's position is that it has no liability for any portion of the Award. The Fund's argument centers around Dr. Schlachter's opinion that claimant's right shoulder was only temporarily aggravated by the June 1, 1992, and September 9, 1992, accidents and claimant suffered no additional permanent disability from those accidents.

An employer may shift liability to the Fund for all or a portion of the compensation awarded, if the employer employed or retained an employee with knowledge of a preexisting impairment which would constitute a handicap in obtaining or retaining employment. The Fund would then be liable if the injury or disability would not have occurred "but for" the preexisting impairment or was contributed to by the preexisting impairment. *See* K.S.A. 1992 Supp. 44-567. Respondent has the burden of proving that it knowingly retained a handicapped employee. *See* Spencer v. Daniel Constr. Co., 4 Kan. App. 2d 613, 619, 609 P.2d 687; rev. denied 228 Kan. 807 (1980). Thus, in this case, respondent must establish it had knowledge that claimant was a handicapped employee at the time she was hired or claimant was retained after obtaining knowledge she was handicapped. Thereafter, respondent has to establish the subsequent injury or disability would not have occurred "but for" or was contributed to by the preexisting impairment.

Claimant injured her right shoulder while working for the respondent on both June 1, 1992, and September 9, 1992. Claimant had previously injured the right shoulder on May 11, 1990, while employed by another employer. There is some question whether respondent had knowledge that claimant was a handicapped employee when she was hired. In fact, respondent argued that claimant's preexisting restrictions should be taken into consideration when determining work disability because respondent did not know of such restrictions. Assuming arguendo, that respondent did not have knowledge the claimant was a handicapped employee when she was hired, the facts of this case are uncontradicted the respondent did have knowledge after both the June 1, 1992, and the

September 9, 1992, accidents that the claimant was handicapped and the respondent retained her in its employment.

Claimant and Dr. Morris both testified claimant was returned to work with restrictions after the September 9, 1992, accident to essentially work with only her left hand. This restriction resulted in claimant sustaining an injury to her left shoulder which then resulted in further permanent restrictions which disqualified claimant from returning to work for the respondent. Dr. Morris was asked during his deposition whether he thought claimant's left shoulder developed problems because of overuse of her left arm to compensate for her injured right shoulder. Dr. Morris answered in the affirmative.

The Appeals Board finds the record as a whole contains credible evidence that respondent retained claimant with knowledge of a preexisting impairment which constituted a handicap. The record as a whole further supports respondent's contention that claimant's resulting work disability would not have occurred "but for" claimant's preexisting right shoulder injury. Accordingly, the Appeals Board concludes the Fund is liable for 100 percent of the Award and costs accrued in this case.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge William F. Morrissey dated May 26, 1995, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Lorrenia L. Jarrell, and against the respondent, Waste Management of Wichita, and its insurance carrier, CNA Insurance Company, and the Kansas Workers Compensation Fund for an accidental injury that occurred on December 9, 1992, and based upon an average weekly wage of $337.31 prior to December 9, 1992, and $365.70 thereafter.

Claimant is entitled to 14.29 weeks of temporary total disability compensation at the rate of $224.88 per week or $3,213.54, followed by 76.43 weeks of temporary total disability compensation at the rate of $243.81 per week or $18,634.40, followed by 189.57 weeks of permanent partial disability compensation at the reduced rate of $77.25 per week or $14,644.28, followed by permanent partial general disability benefits at an unreduced rate of $99.96 per week for 134.71 weeks or $13,465.61, for a 41% permanent partial general disability, making a total award of $49,957.83.

As of December 15, 1996, there is due and owing the claimant 14.29 weeks of temporary total disability compensation at the rate of $224.88 per week or $3,213.54, followed by 76.43 weeks of temporary total disability compensation at the rate of $243.81 per week or $18,634.40, followed by 118.85 weeks of permanent partial disability

compensation at the reduced rate of $77.25 per week or $9,181.16 for a total due and owing of $31,029.10 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $18,928.73 is to be paid for 70.72 weeks at the reduced rate of $77.25 per week or $5,463.12 followed by 134.71 weeks at the unreduced rate of $99.96 per week or $13,465.61, until fully paid or further order of the Director.

The Workers Compensation Fund is hereby ordered to pay 100% of the Award and costs entered in this matter.

All remaining orders of the Special Administrative Law Judge contained in his Award that are not inconsistent with this Order are incorporated herein and made a part of this Order.

IT IS SO ORDERED.

Dated this ____ day of December 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steven L. Foulston, Wichita, KS
Eric T. Lanham, Kansas City, KS
Marvin Appling, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director